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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	EB DOCKET NO. 03-96
	)	
NOS COMMUNICATIONS, INC.,	)	File No. EB-02-TC-119
AFFINITY NETWORK INCORPORATED,	)	
and NOSVA LIMITED PARTNERSHIP	)	NAL/Acct. No. 200332170003
	)	
Order to Show Cause and Notice of	)	FRN: 0004942538
Opportunity for Hearing	)	

To: Honorable Arthur I. Steinberg
Administrative Law Judge

ENFORCEMENT BUREAU'S OPPOSITION TO JOINT MOTION FOR PROTECTIVE ORDER

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June 17, 2003

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Summary

On June 6, 2003, NOS Communications, Inc., Affinity Network Incorporated, NOSVA Limited Partnership, and their principals (collectively, the "Companies") filed a Joint Motion for Protective Order (the "Motion"). The Motion relates to the *Request for Admission of Facts and Genuineness of Documents* (the "RFA"), directed to the Companies and filed by the Enforcement Bureau (the "Bureau") on May 27, 2003. In their Motion, the Companies characterize the RFA as "excessive" and request that the Presiding Judge issue a protective order directing the Bureau to serve "individual tailored requests" on each party to the captioned proceeding and to limit to fifty the number of admissions proposed to each such party.

The Bureau demonstrates in its Opposition that the Motion should be dismissed or denied. First, section 1.313 of the Commission's rules, which pertains to the issuance of protective orders in hearing proceedings, is expressly limited to discovery matters, not prehearing procedures such as requests for admissions. Accordingly, the Motion seeks action by the Presiding Judge that is outside of the scope of the rule.

Moreover, the Companies fail to cite any Commission precedent in which a protective order has been issued limiting a hearing designee's obligation to respond to a request for admissions, prohibiting a party from directing a request for admissions to more than one other party or restricting the number proposed admissions that may be directed to a hearing designee, as they urge here, nor is the Bureau is aware of any such precedent. The Bureau's RFA contains proposed admissions that are similar in form, number and content to those routinely served on and responded to by hearing designees in Commission hearings. The Companies have provided the Presiding Judge no reason to depart from

established Commission authority and create contrary precedent here.

In the *Order to Show Cause and Notice of Opportunity for Hearing* in this proceeding, the Commission observed that the Companies, switchless resellers of long distance service that are ostensibly alter egos for one another, formed and operated by a common group of individuals, appear to have engaged in a misleading scheme to defraud their former customers into returning their business to the Companies. The Bureau's proposed admissions, served on each such related party, seek to obtain information relevant to the designated issues, the receipt of which is necessary for it to formulate and commence its discovery in the proceeding. The Companies filed as soon as the Presiding Judge had granted their requests for a thirty-day extension of the deadline by which they were required to have responded to the RFA, the Companies seek to delay the progress of this proceeding, with the apparent hope that, by running out the clock until the September 26, 2003, deadline for the completion of discovery, they can frustrate the Bureau's efforts to establish a factual record. The Presiding Judge should deny or dismiss the Motion and the Companies should be directed to respond to the proposed admissions by the current July 11, 2003, deadline.

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To: Honorable Arthur I. Steinberg
Administrative Law Judge

ENFORCEMENT BUREAU'S OPPOSITION TO JOINT MOTION FOR PROTECTIVE ORDER

1. On June 6, 2003, NOS Communications, Inc. ("NOS"), Affinity Network Incorporated ("ANI"), NOSVA Limited Partnership ("NOSVA"), and their principals (collectively, the "Companies") filed a *Joint Motion for Protective Order* (the "Motion") in the above-captioned proceeding. By the Motion, the Companies seek relief from their obligation to respond, by July 11, 2003, to the May 27, 2003, *Requests for Admission of Facts and Genuineness of Documents* (the "RFA") filed by the Enforcement Bureau (the "Bureau"). Specifically, the Companies request that the Presiding Judge direct the Bureau "to serve tailored admission requests directed to separate named parties of no more than fifty requests per respondent party."[1] By its attorneys and pursuant to section 1.294(b) of the Commission's rules, 47 C.F.R. § 1.294(b), the Bureau hereby submits its Opposition to the Motion. As demonstrated herein, the Motion is contrary to the Commission's rules. As the latest in a series of maneuvers by the Companies

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[1] See Motion at 1.

intended to frustrate the progress of the captioned hearing and the creation of a full and complete record necessary to resolve the issues that the Commission has designated against them, the Presiding Judge should dismiss or deny the Motion and direct the Companies and their principals to respond to the RFA by the current deadline.

I. BACKGROUND

2. By *Order to Show Cause and Notice of Opportunity for Hearing* in the captioned proceeding (the "OSC/NOH"),[2] the Commission designated the Companies for hearing to determine if they had engaged in a misleading telemarketing effort, referred to as the "Winback Campaign," in violation of section 201(b) of the Communications Act of 1934, as amended, which prohibits carriers from unjust and unreasonable practices.[3] In the *OSC/NOH*, the Commission recounted the substantial evidence before it that suggests that NOS, ANI, NOSVA, and possibly other related entities, acting through a core group of individuals, engaged in this "continuous telemarketing campaign, apparently intended for the sole purpose of tricking and threatening former customers . . . to switch their services back to" the Companies, a practice which "depicts a callous disregard for the requirements of the Communications Act and section 201(b) in particular."[4] The Commission noted that, although NOS, ANI, and NOSVA are organized as separate companies, they apparently share the same officers, directors and major shareholders and operate from common facilities in Las Vegas, Nevada.[5] Because of the maze of apparently

[2] 18 FCC Rcd 6952 (2003).

[3] 47 U.S.C. § 201(b).

[4] *OSC/NOH*, 18 FCC Rcd at 6961.

[5] *OSC/NOH*, 18 FCC Rcd at 6953, n. 4.

interrelated organizations that these individuals have created to engage in such illegal conduct, the *OSC/NOH* expansively defined NOS/ANI to include, not only the Companies, but all such other entities "identified or unidentified."[6] The *OSC/NOH* contemplated, *inter alia*, the revocation of the Companies' authority to operate and the issuance of a cease and desist order against them. Moreover, in order to prevent future similar abuses to the public, the *OSC/NOH* contemplated that the Companies or their apparently common group of principals be required to obtain prior Commission consent before any may again provide interstate common carrier services.[7]

3. On May 27, 2003, pursuant to section 1.246 of the Commission's Rules, 47 C.F.R. § 1.246, the Bureau filed its RFA. In light of the apparent commonality of the Companies and their respective principals, the identities of whom are unknown to the Commission, the Bureau directed the RFA to all such parties. Consistent with Section 1.246(b) of the rules, the Bureau requested responses within ten days of its service of the RFA upon counsel for the Companies, by June 9, 2003.

4. Instead of preparing a response, on May 28, counsel for NOS telephoned Bureau counsel and requested the Bureau's consent to a thirty-day extension of time to respond to the RFA. Mindful of the September 26, 2003, deadline that the Presiding Judge had established for the close of discovery in this proceeding,[8] but willing to accommodate a reasonable extension, Bureau counsel consented to an extension of two weeks. Nevertheless, on May 30, NOS filed a Motion

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[6] *OSC/NOH*, 18 FCC Rcd at 6952, n. 1.

[7] *OSC/NOH*, 18 FCC Rcd at 6952-53.

[8] *Order*, FCC 03M-19, released May 23, 2003.

with the Presiding Judge requesting, on behalf of all the parties, the full thirty-day extension.[9] Therein, NOS indicated that the additional time was necessary due to the large number of proposed admissions contained in the RFA, the Companies' need to coordinate responses among multiple parties, and the busy schedules of counsel and the principals. It also stated that "NOS has not received FOIA documents . . . which we believe are necessary to adequately respond to the Admissions."[10] Finally, NOS argued that the extra time was necessary because "the Bureau chose to file one set of Admissions addressed to all parties, including unnamed parties, leaving the respondents and unnamed parties to try to sort out who should respond to what admission request and exactly how this can be done procedurally."[11] On June 4, counsel for ANI, NOSVA, and the principals of the Companies served Bureau counsel with a similar motion, seeking the same extension of time and repeating the arguments contained in the *NOS Motion for Extension*.[12] Of note, neither motion suggested the Companies needed additional time for anything other than responding fully to the RFA.

5. On June 6, the Presiding Judge provided the Bureau with an advance copy of his Order which he had issued that day,[13] granting the thirty-day extension for all parties and setting

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[9] *Motion for Extension of Time to Respond to Admissions Request*, EB Docket No. 03-96 (May 30, 2003) ("NOS Motion for Extension").

[10] The Companies have no *bona fide* need to see the Commission's documents that are the subject of the FOIA request in order to admit or deny the truth of the Bureau's proposed admissions, which relate to matters pertaining to their business operations of which they should have first-hand knowledge. The truth of each proposed admission is not a function of the nature of the evidence that the Commission may or may not possesses.

[11] *NOS Motion for Extension*.

12 *Motion for Extension of Time to Respond to Admissions Request*, EB Docket No. 03-96 (June 4, 2003). On June 6, counsel for ANI, NOSVA, and the principals of the Companies advised Bureau counsel that, because he had failed to file with the Commission this motion that he had served on June 4 on Bureau counsel, he had filed it on June 6.

[13] *Order*, FCC 03M-020, released June 10, 2003. Therein, the Presiding Judge indicated that he had granted the full

July 11, 2003, as the new response date. Later that day, the Companies filed the instant Motion.[14] Therein, they now claim that, notwithstanding the statements in their extension requests, including such a request reportedly filed that same day by counsel for ANI, NOSVA, and the principals of the Companies, "counsel has had the opportunity to conduct a more fulsome review of the Admissions" and has concluded that "it is impossible to respond to such a filing."[15]

II. DISCUSSION

A. The Motion Should Be Dismissed as Unauthorized by the Commission's Rules

6. At the outset, the relief that the Companies seek by their Motion is not authorized by the Commission's rules. The only rule that governs the issuance of protective orders in hearing cases is 47 C.F.R. § 1.313, to which the Companies cite in their Motion.[16] That rule, however, applies only to "the procedures set forth in sections 1.311 through 1.325" - sections relating to discovery (*i.e.*, depositions, interrogatories and the production of documents).[17] In contrast, section 1.246 pertains to requests for admissions and is not subject to the protective order rule because admissions are not considered to be part of discovery in a Commission hearing, but instead

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thirty-day extension requested by NOS to all parties, relying upon the Companies' representations to the effect that responding to the RFA "will require an extensive amount of work by, and substantial coordination among, the responding parties." The Presiding Judge presumably also notified counsel for the Companies of his ruling on Friday, June 6 in light of the Companies' response deadline the following Monday.

[14] Bureau counsel received a fax of the subject Motion from NOS counsel on June 6 at approximately 4 p.m. It defies credulity that counsel for the Companies had not decided to seek a protective order, rather than respond to the RFA, before the Presiding Judge's June 6 grant of the Companies' extension requests.

[15] *See* Motion at n. 1, 2.

[16] *See* Motion at 1, 4.

[17] *See* 47 C.F.R. § 1.313 ("The use of the procedures set forth in §§ 1.311 through 1.325 of this part is subject to control by the presiding officer, who may issue any order consistent with the provisions of those sections which is appropriate and just for the purpose of protecting parties and deponents or of proving for the proper conduct of the proceeding.")

are deemed to constitute a "prehearing procedure."[18] As such, relief from admissions may be had only through written objections to specific proposed admissions, as expressly provided for in section 1.246(b).[19] Therefore, under section 1.313, a protective order may not be issued with respect to the RFA. Because the Motion seeks relief that is not authorized by the rules,[20] the Motion should be dismissed.

B. If the Motion is Considered on the Merits, It Should Be Denied

1. The Bureau's Service of the RFA on the Companies was Appropriate

7. In the event that the Presiding Judge considers the Motion on its merits, notwithstanding the fact that it is unauthorized by the Commission's rules, the Companies have failed to demonstrate that issuance of a protective order is warranted. The Companies maintain that the Bureau's serving one set of admissions on them was somehow improper, because section 1.246 of the rules provides that a party may serve an RFA "on any other party." The Companies offer no precedent to support their novel construction of the rule to prohibit service of an RFA on "multiple parties," nor is the Bureau aware of any such authority.

8. Nor is there any merit in the Companies' threat of confusion if they are required to respond to the RFA in light of the commonality of the Companies and their principals as noted by

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[18] *See* 47 C.F.R. § 1.246. The Commission made a deliberate decision to separate admissions from discovery procedures when it promulgated Part 1 of its rules. *See In re Amendment of Part 1 of the Rules of Practice and Procedure to Provide Discovery Procedures, Report and Order*, 11 FCC 2d 185, ¶ 2 (1968).

[19] Section 1.246(b)(2) authorizes written objections to admissions on grounds of relevance, privilege, "or that the request is otherwise improper in whole or in part." 47 C.F.R. § 1.246(b)(2).

[20] The other Commission rules that the Companies cite in support of their Motion are similarly unavailing. Section 1.45 specifies the filing periods to respond to non-hearing pleadings; section 1.243 specifies the authority of a presiding officer in conducting a hearing and section 1.248 governs the hearing process.

the Commission in the *OSC/NOH*.[21] The Companies' contention that the Bureau's failure to name the principals creates confusion is unpersuasive. As noted, *supra*, one of the designated issues contemplates the possible issuance of a cease and desist order against the Companies and their principals from the provision of any interstate common carrier services without the prior consent of the Commission. After the Prehearing Conference at which counsel of record for those principals declined to identify the principals (his clients), the Bureau drafted the RFA, in part, to elicit this crucial information. Counsel for the principals know the identity of their clients here, as do counsel for NOS, who cited their "longstanding travel plans" as support in the May 30 extension request.[22] Similarly, the logic in the Companies' contention that they cannot respond to the consolidated RFA because they were not named as parties in the *OSC/NOH*[23] is based upon a premise that is contrary to the truth: if the *OSC/NOH* was ambiguous in any way, the Presiding Judge's ruling at the May 21 Prehearing Conference, memorialized by his subsequent Order,[24] confirms that the Companies are, in fact, parties to this proceeding.

9. In the *OSC/NOH*, the Commission observed that "it appears that NOS, ANI, and NOSVA are alter egos of the same company and therefore each will be held jointly and severally liable for any apparent violations discussed herein."[25] Just as the Companies apparently utilized a series of interrelated entities to victimize the public in their fraudulent marketing efforts, they now seek to avoid responding to the RFA with the smokescreen that it will be impossible for them to

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[21] 18 FCC Rcd at 6953-54, n. 1.

[22] *Motion for Extension of Time*.

[23] *Motion* at 2.

[24] *Order*, FCC 03M-19, released May 21, 2003.

[25] *OSC/NOH*, 18 FCC Rcd at 6953, n. 4.

coordinate responses to the RFA among these purportedly distinct entities. Regardless of the number of corporate shells that the Companies create or the different law firms that they retain to represent them before the Commission, there appears to be a single core group of people responsible for the apparent gross misconduct outlined in the *OSC/NOH*. The Bureau drafted the RFA to ascertain the facts; the Presiding Judge should direct the Companies to comply with their obligation under the rules and provide that information.

2. The Number of Admissions Proposed By the Bureau is Appropriate

10. The Companies also allege that the RFA is "excessive and burdensome" in number and request that the Bureau be limited to no more than fifty proposed admissions to any one party. This request, however, is devoid of any legal support and contrary to the Commission's carefully crafted hearing procedures that are designed to limit the issues that must be resolved by a presiding judge through the use of admissions.

11. The Companies rely for their request on inapposite hornbook authority and precedent involving the Federal Rules of Civil Procedure and proceedings before the Federal Trade Commission (the "FTC"). Federal courts and the FTC, however, consider admissions to be a component of the discovery process and protective orders are expressly contemplated to limit their use.[26] The Commission, in contrast, uses requests for admissions as a prehearing tool to narrow

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[26] *See* Fed. R. Civ. P. section V; 16 C.F.R. § 3.31. In fact, as demonstrated by the cases that the Companies cite, in many instances in federal courts, admissions are the final phase in protracted discovery carried out over many months or even years. *See Minnesota Mining and Manufacturing v. Norton Co.*, 36 F.R.D. 1, 1 (N.D. Ohio 1964) (stating admissions are "the last stage of discovery proceedings" in a case requiring the oversight of three federal judges); *Mitchell v. Yeutter*, No. 89-1465-FGT, 1993 WL 139218 (D. Kan. Jan. 12, 1993) (involving discovery continuing well over a year and delegated to a magistrate); *United States v. Medtronic, Inc.*, Nos. 95-1236-MLB, 96-1309-MLB, 2000 WL 1478476 (D. Kan. July 13, 2000) (involving discovery extending over five years). Federal court and FTC practice also include initial disclosure requirements absent in Commission practice. The FTC rule cited in *In re Schering-Plough Corporation*, Docket No. 9297, 2001 WL 1529271 (F.T.C. Nov. 2, 2001), 16 C.F.R. § 3.31.

the issues that must be dealt with in discovery and resolved at hearing and has specifically designated admissions as part of the prehearing process.[27] Accordingly, Commission rules require that admissions be served at only one time, at the commencement of a hearing proceeding, within twenty days of the due date for the submission of notices of appearance, and responses are required not less than ten days later.[28]

12. The discovery process established here illustrates the need for the RFA to be responded to fully at the prehearing stage. The Bureau must complete its discovery in this complex case in approximately three months. Accordingly, the early identification of all undisputed facts and issues is crucial to the Bureau's discovery and, eventually, the development of the hearing record to potentially eliminate factual issues with the hope that some, if not all, of the designated issues in this case can be resolved by summary judgment.[29]

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mirrors Fed. R. Civ. P. 26(a)(1). Immediately after the initiation of a case (five days at the FTC, fourteen in federal court), parties must disclose extensive information about the allegations at issue *and all defenses*, including the name, address, and contact information of each individual likely to have relevant information and copies or descriptions by category and location of all relevant documents. Presumably, such disclosures serve a similar purpose in those cases to admissions procedures in Commission hearings. In addition, the Bureau notes: (1) that *Schering-Plough* is factually distinct from our case because the issue of an extension of time to respond was not contemplated as alternative relief and (2) there are scores of federal cases that the Companies failed to cite wherein a federal court refused to issue a protective order to limit the number or scope of admissions, reasoning that a large number of admissions requests are appropriate and useful to narrow the issues in complex cases. *Accord Photon, Inc. v. Harris Intertype, Inc.* 28 F.R.D. 327, 328 (D.Mass. 1961) (allowing 704 requests for admission); *Moscowitz v. Baird*, 10 F.R.D. 233, 234 (S.D.N.Y. 1950); *Al-Jundi v. Rockefeller*, 91 F.R.D. 590, 592 (W.D.N.Y. 1981); *Shawmut, Inc. v. American Viscose Corp.*, 12 F.R.D. 488, 489 (D. Mass. 1952).

[27] *Compare* 47 C.F.R. Part 1, Subpart B, "Prehearing Procedures," including section 1.246 to section 1.249, *with* 47 C.F.R. Part 1, Subpart B "The Discovery and Preservation of Evidence," including section 1.311 to section 1.325; *Amendment of Part 1*, 11 FCC Rcd 185, ¶ 2.

[28] *See* 47 C.F.R. § 1.246(a), (b).

[29] For example, in the recent proceeding involving Family Broadcasting, Inc., *Family Broadcasting, Inc., Order to Show Cause and Notice of Opportunity for Hearing*, EB Docket No. 02-39 (2001), the Bureau on March 23, 2001, served 167 requests for admissions, including 30 attachments, on the hearing designee. Although that broadcast case presented factual and legal issues different from those present here, the general form and content of the Bureau's proposed admissions were similar to those provided in the subject RFA. On April 4, 2001, the hearing designee timely provided complete responses, which ultimately served to limit the issues before the presiding judge to the extent that the Bureau was able to file, and the presiding judge grant, a motion for summary decision based

At a minimum, the issues can be narrowed, but only if the companies proceed in good faith to respond to the RFA.

13. In light of the objectives of the Commission's admissions process, the Bureau drafted its proposed admissions consistent with the issues described in the *OSC/NOH* in an effort to simplify the upcoming hearing proceeding. The alleged operations of the Companies and their principals were complex and the facts at issue are entirely within the knowledge of those parties.[30] For instance, as examples of the Companies' fraudulent Winback practices, the *OSC/NOH* alleges that fourteen different telecommunications customers were victims of the Companies' scheme.[31] As a result, the RFA includes proposed admissions concerning the Companies' contacts with each apparent victim of these illegal practices.[32] The number of questions with respect to each incident is limited, with between 17 and 42 admissions and, on average, 30 admissions per incident. The majority of the proposed admissions, 425 of 645, are comprised of these sets of inquires. It is only because of the sheer number of the Companies' apparent violations and the convoluted nature of their operations that so many proposed

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exclusively on the responses. *See Enforcement Bureau's Motion for Summary Decision* in EB Docket No. 02-39 (July 10, 2001); *Family Broadcasting, Inc., Summary Decision*, 16 FCC Rcd 15,619 (ALJ Mar. 28, 2002). The Commission overturned the summary ruling on other grounds. *Family Broadcasting, Inc., Memorandum Opinion and Order and Hearing Designation Order*, 17 FCC Rcd 6180 (2002). The proceeding is currently being held in abeyance pending the outcome of the Media Bureau's consideration of a pending assignment application, the grant of which would obviate the need for hearing. *Order*, FCC 02M-09 (ALJ Feb. 26, 2003). In other hearing cases, the Bureau has filed admissions requests similar in form and content to those propounded here but less in number, reflecting the relatively fewer issues potentially in dispute in those matters. In each case, the hearing designee responded to the requests in full. In *Peninsula Communications Inc., Memorandum Opinion and Order and Order to Show Cause*, EB Docket No.02-21 (2001), the Bureau filed approximately 60 admissions requests, including 15 attachments, on March 7, 2002. Responses were provided on March 28, 2002. In *Herbert Schoenbahm, Hearing Designation Order*, WT Docket No. 01-352 (2002), the Bureau filed approximately 30 admissions requests, including approximately 10 attachments, on March 1, 2002. Responses were provided on March 14, 2002. In each instance, the responses narrowed the issues and assisted in the efficient disposition of the designated matters.

[30] *See generally OSC/NOH.*

[31] *OSC/NOH*, 18 FCC Rcd at 6961-64, ¶¶ 15- 22 and 6995-96, Appendices C-E.

admissions were necessary. Whatever burden they impose on the Companies has been minimized by the generous amount of additional time that the Presiding Judge has provided them to respond to the RFA.[33]

3. The Content of the Bureau's Proposed Admissions is Appropriate

14. The remainder of the Companies' Motion complains about the content of the proposed admissions, which the Companies term "argumentative," "vague," designed to "call for legal conclusions" or "the beliefs of third parties," and as to some, just plain "unintelligible."[34] To the contrary, the admissions present simple and straight forward facts, that the Companies are asked to admit or deny, such as that particular individuals were employed by the Company on certain dates,[35] the identity of the Companies' principals,[36] that certain persons were customers of the Companies on specified dates,[37] that certain documents are copies of items that originated in the Companies' files,[38] and that certain tapes (and

[33] *See, e.g.*, Proposed Admissions nos. 372-389.

[34] The Bureau agrees with one characterization of the law provided by the Companies in their Motion, at page 4: the Presiding Judge has "the overall authority to prescribed [sic] procedures for the appropriate conduct of this proceeding." 47 C.F.R § 1.243. Considering the Companies' objective of delay, when the Presiding Judge appropriately dismisses or denies the Motion, their next step will predictably be to seek a further extension of the deadline by which they must respond to the RFA, in order to further prejudice the Bureau's efforts to ascertain the facts of their misconduct. The Presiding Judge should not permit such a motion. As a result of the Companies' efforts to delay, the Bureau has already lost one of the four months allowed for discovery in this case. This is particularly prejudicial to the Bureau and the public interest because the Companies alone possess the relevant facts.

[35] These arguments do not support a motion for a protective order. As noted above, 47 C.F.R. § 1.246(b) sets out a comprehensive scheme for objecting to admissions that does not include the relief sought by the Companies.

[36] *See, e.g.*, Proposed Admissions nos. 42, 55-61, 193-205.

[37] *See, e.g.*, Proposed Admissions nos. 18-33.

[38] *See, e.g.*, Proposed Admissions nos. 207-09, 240-42, 262-64, 305-07, 346-48, 372-74, 390-92, 414-16, 447-49, 474-76, 508-10, 540-42, 567-69, 608-610.

[38] *See, e.g.*, Proposed Admissions nos. 191, 206, 636, 640.

transcripts of those tapes prepared by a court reporter) contain the recorded conversations of the Companies' employees.[39] All of the Bureau's proposed admissions are relevant to the designated issues.

15. The admissions cited by the Companies as argumentative[40] go to the heart of the factual allegations in the *OSC/NOH* that the Companies engaged in the fraudulent Winback Campaign for the purpose of tricking, threatening and misleading the public,[41] and are designed to determine what operative facts, if any, the hearing designee will dispute. Those characterized by the Companies as vague[42] are simple factual statements concerning the Companies' employment of certain individuals.[43]

16. The admissions cited by the Companies as calling for legal conclusions[44] only seek acknowledgement by the Companies of the applicability to them of simple legal principles to avoid the need for briefing before and resolution by the Presiding Judge. Because none of

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[39] *See, e.g.*, Proposed Admissions nos. 177-190. The Companies objection that portions of the tapes (and corresponding transcripts) are irrelevant to this proceeding is particularly unfounded. *See* Motion at 2 . While the Bureau concedes that portions of the tapes do not contain conversations relevant to the fraudulent winback campaign perpetrated by the Companies against the public, other parts of each of those tapes do contain such evidence. In the interest of full disclosure, the Bureau attached the complete tapes (and transcripts thereof) to avoid objections from the Companies that the materials were incomplete or that the Bureau tampered with them -- disputes from the Companies that might otherwise delay the Companies' responses.

[40] *See* Motion at 5, n. 4.

[41] *OSC/NOH*, 18 FCC Rcd at 6958-60, and 6995-96, Appendices C-E.

[42] *See* Motion at 5, n. 5.

[43] For instance, Admission no. 26, which the Companies claim is vague, states simply "[a]t some time during the period December 2001 to the present, Michael Arnau was an executive of ANI." If, in responding to the RFA, the Companies find a specific term in the proposed admissions to be vague or unclear to them, they may contact Bureau counsel for clarification. The extended period provided for response certainly permits time for consultation and Bureau counsel are willing to provide such clarification without the necessity of bringing the matter before the Presiding Judge. However, the Companies' bare claim to not understand a specific term is certainly not grounds to support the issuance of a protective order limiting the number and/or scope of admissions that the Bureau may pose.

these stated legal principles can be seriously disputed by the Companies, the admissions will increase the efficiency of this hearing by eliminating the need for testimony and resolution at hearing regarding such basic, undisputed matters.

17. The admissions characterized by the Companies as "calling for beliefs of third parties"[45] do no such thing. The Bureau does not intend that the Companies respond except as to their own knowledge which, consistent with the standard definition contained in the RFA,[46] is knowledge held by those entities through their respective directors, officers, employees, shareholders, agents, and consultants who may have information relevant to the Bureau's various proposed admissions.

18. Similarly, the proposed admission which the Companies characterize as "unintelligible"[47] is a simple request concerning the Companies' involvement in the telecommunications industry. As with the other disputed admissions, it is readily susceptible to an answer from the Companies, which they should be directed to supply forthwith pursuant to their obligations under the Commission's rules.

III. CONCLUSION

19. For the reasons cited herein, the Presiding Judge should exercise his authority under

[14] *See* Motion at 5, n. 6.

[15] *See* Motion at 5, n. 7.

[16] *See* RFA at 2.

[17] *See* Motion at 5, n. 8.

section 1.243 and immediately[48] issue an order dismissing the Companies' Motion and directing them to respond to the RFA by the already extended July 11 deadline. The compelling public interest in the development of a full and complete record in this proceeding by which the Presiding Judge can resolve the designated issues and impose whatever sanctions are necessary against the Companies and their principals to shield consumers from their possible further wrongdoing demands nothing less.

Respectfully submitted,
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June 17, 2003

[48] Because the Commission's rules do not authorize the filing by the Companies of a reply to the Bureau's Opposition, the Presiding Judge may so act at once. 47 C.F.R. § 1.294(b).

CERTIFICATE OF SERVICE

Yolanda Giles, a secretary of the Enforcement Bureau's Investigations and Hearings Division, certifies that she has, on this 17th of June, 2003, sent, by first class United States mail, copies of the foregoing "Enforcement Bureau's Opposition to Joint Motion for Protective Order" to:

*Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
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